18

FILE COPY

Supreme Court, U. S.
FILED
NOV 9 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

ALBERT H. COLE,
Peru, Indiana,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Table of cases	i
Table of textbooks	iv
Table of statutes	v
Introduction	1
Supplemental statement of the case	2
Specification of errors	17
Summary of argument	18
Argument	20
Point I	20
Point II	21
Point III	26
Point III (a)	26
Point III (b)	29
Point IV	35
Point V	46
Point VI	57
Conclusion	65

Table of Cases Cited.

Aldredge v. B. & O. R. Co., 20 F. (2d) 655 ..... 24, 25

Atchison etc. R. Co. v. McNulty, 285 Fed. 97 (C. C. A., 8th Cir.) 47

Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206 (C. C. A., 5th Cir.), affirmed 215 U. S. 501, 54 L. Ed. 300 32

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805 37

Central Vermont R. Co. v. Perry, 10 F. (2d) 132, 133 .. 28

INDEX.

	Page
Table of cases	i
Table of textbooks	iv
Table of statutes	v
Introduction	1
Supplemental statement of the case	2
Specification of errors	17
Summary of argument	18
Argument	20
Point I	20
Point II	21
Point III	26
Point III (a)	26
Point III (b)	29
Point IV	35
Point V	46
Point VI	57
Conclusion	65

Table of Cases Cited.

Aldredge v. B. & O. R. Co., 20 F. (2d) 655 ..... 24, 25

Atchison etc. R. Co. v. McNulty, 285 Fed. 97 (C. C. A., 8th Cir.) 47

Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206 (C. C. A., 5th Cir.), affirmed 215 U. S. 501, 54 L. Ed. 300 32

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805 37

Central Vermont R. Co. v. Perry, 10 F. (2d) 132, 133 .. 28

Chesapeake & Ohio R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947 47
Chicago & Erie R. Co. v. Feightner, 75 Ind. App. 677, 114 N. E. 659 37
Chicago B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. Ed. 941 36
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77 36
Chicago etc. R. Co. v. Industrial Commission, 284 U. S. 296 36
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 647 37
Cohens v. Virginia, 6 Wheat. 264 34
Cound v. A. T. & S. F. R. Co., 173 Fed. 527 (West Div. Texas) 32
Curran v. Chicago Short Line Ry. Co., 198 Ill. App. 154, writ of error dismissed 246 U. S. 655 ..... 54, 55
Davis, Director General, v. Maury, 266 U. S. 401, 69 L. Ed. 350 64
Director General v. Ronald, 265 Fed. 128, 147 28
Erie R. Co. v. Welsh, 252 U. S. 303, 61 L. Ed. 319 36
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73 40
Gilbert v. David, 235 U. S. 561, 59 L. Ed. 360 23
Goff, W. H. Co., v. Lamborn, 281 Fed. 613 (C. C. A., 5th Cir.) 32
Grigsby v. Southern R. Co., 3 F. (2d) 988, certiorari denied 268 U. S. 704 39
Henry v. Providence etc. Co., 90 Atl. 168 (R. I.) 47
Hickey v. Missouri P. R. Co., 8 F. (2d) 128 (C. C. A., 8th Cir.) 47, 51
Hudson v. Rome etc. R. Co., 145 N. Y. 408, 40 N. E. 8 .. 47
Hunter v. N. Y. etc. R. Co., 116 N. Y. 615, 23 N. E. 9 ... 47
Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051 36

Karras v. Great Northern R. Co., 167 Minn. 140, 208 N. W. 655 47
Keasbey & Mattison Co., Re, 160 U. S. 221 31
Langness v. Green, 282 U. S. 531, 536 20
Larsen v. Northern Pac. R. Co., 241 N. W. (Minn.) 312 47
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 61 L. Ed. 1070 36
Louisville etc. R. Co. v. Chambers, 165 Ky. 320, 178 S. W. 1041 47
Louisville & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440 37
Mayor v. Central Vt. R. Co., 26 F. (2d) 905 (S. Dist. N. Y.), affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.) .. 36
McCormick Co. v. Walters, 134 U. S. 41 31
McGlade v. City of Waterloo, 156 N. W. 680 (Iowa) .. 47
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023, affirmed 245 U. S. 629, 62 L. Ed. 519 37
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21 37
Nashville v. Cooper, 6 Wall. 247 33
Newell v. Baltimore etc. R. Co., 181 Fed. 698 (W. Dist. Pa.) 28
New Orleans N. & T. R. Co. v. Mississippi, 102 U. S. 135 34
N. Y. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420 36
Osborn v. Bank of U. S., 9 Wheat. 738 33
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746 37
Pennsylvania R. Co. v. Chamberlain, 53 S. Ct. Rep. 391, 394, 77 L. Ed. Adv. 503, 506 46
Pennsylvania R. Co. v. Knox, 218 Fed. 748 (C. C. A., 3rd Cir.) 36
Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139 41

Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 393...24, 44
Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142 .....47, 50
San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484.. 27
Schauffele v. Director General, 276 Fed. 115..... 39
Shauberger v. Erie R. Co., 25 F. (2d) 297 (C. C. A., 6th Cir.) 36, 38, 40
Smith v. Detroit etc. R. Co., 175 Fed. 506 (N. Dist. Ohio) 32
Southern R. Co. v. Smith, 86 Fed. 292 (C. C. A., 5th Cir.) 47
Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 560..... 20
Tennessee v. Davis, 100 U. S. 257..... 34
Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874 .....27, 28
Trapp v. B. & O. R. R. Co., 283 Fed. 655..... 32
Union Pacific R. Co. v. Myers, 115 U. S. 1..... 32
U. S. v. American Ry. Express Co., 265 U. S. 425, 436.. 20
Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557 (C. C. A., 8th Cir.)..... 47
Whittaker v. Illinois Central R. Co., 176 Fed. 130 (E. Dist. La.) 31
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692 (C. C. A., 2nd Cir.) 36, 38

Table of Textbooks Cited.

Elliott on Railroads (3rd Ed. 1922), Sec. 2714, 26 R. C. L. 1070.....47, 50
Roberts on Federal Liabilities of Carriers, Second Edition, Sec. 539 41

Table of Statutes Cited.

Burns' Annotated Indiana Statutes 1926, Sec. 389..... 22
Employers' Liability Act of Kentucky..... 3
Federal Employers' Liability Act, 45 U. S. C. A. 51.3, 21, 32
Federal Safety Appliance Act, 45 U. S. C. A. 1—
2, 4, 14, 15, 16, 21, 23, 26, 27, 28, 29, 30, 32, 34, 54, 58, 63, 64
Judicial Code, Section 24 amended 28 U. S. C. A. 41... 29
Judicial Code Section 51 (a), amended 28 U. S. C. A.
112 (a) 22, 30
Orders of Interstate Commerce Commission of March
13, 1911.....3, 4, 14, 15, 16, 21, 23, 27, 30, 54, 58, 63, 64
Practice Conformity Act, 28 U. S. C. A. 724..... 22

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

MAY IT PLEASE THE COURT:

The judgment of the District Court was reversed by the Circuit Court of Appeals on account of errors committed by the District Court with respect to its jurisdiction. Other errors, occurring on the trial and assigned as error in the Circuit Court of Appeals, were not discussed in the opinion

of that court. The petition for a writ of certiorari and the brief in its support were confined to the jurisdictional questions upon which the reversal was based, and respondent's brief in opposition to the granting of the writ was likewise limited to these questions of jurisdiction.

A writ of certiorari having been granted, the entire record is now before this Honorable Court. Respondent insists that a reversal of the judgment of the District Court was proper, not only because of errors with respect to its jurisdiction, but because of these other errors so occurring and assigned. While they were not pertinent to a determination of the question as to whether a writ of certiorari should issue to review the decision of the Circuit Court of Appeals on the question of the jurisdiction of the District Court or as to the correctness of the instructions contained in the order of the Circuit Court of Appeals remanding the cause, they are essential to a determination of the question as to what judgment the Circuit Court of Appeals should have rendered upon the record then before it. A consideration of the errors assigned in the Circuit Court of Appeals, both jurisdictional and occurring on the trial, requires the following

SUPPLEMENTAL STATEMENT OF THE CASE.

The petitioner brought this action against the respondent in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover dam-

ages for personal injuries alleged to have been sustained while he was employed as a switchman in respondent's yards at Russell, Kentucky (R. 2). The complaint was in two paragraphs, each seeking to recover for the same injury. It was alleged in each paragraph that the injury was occasioned by a coupler which was defective, in that it failed to comply with certain requirements of the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission thereunder promulgated.

The first paragraph alleged that respondent was engaged, and Moore was by it employed, in interstate commerce, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States approved April 22nd, 1908, and amendments thereto, and which act is commonly known as the Federal Employers' Liability Act, and under a certain act of the Congress of the United States known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission; * * * that said laws of the United States give to this Court jurisdiction to hear and determine this cause of action." It was further alleged that respondent was doing business within the territorial limits of said District Court (R. 2).

The second paragraph, while alleging that respondent was engaged in interstate commerce, and doing business within the territorial limits of said District Court, alleged that Moore was employed by respondent in intrastate com-

merce. It further alleged that Moore was a resident of Fort Wayne, Indiana, and a citizen of Indiana, and that respondent was a Virginia corporation and a citizen of Virginia, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States, commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States," and also under certain laws of Kentucky, which were therein set out (R. 7).

Respondent appeared specially and filed, in two paragraphs, a plea in abatement to the jurisdiction of the District Court. The first paragraph was directed to the first paragraph of complaint. It denied that Moore was engaged in interstate commerce at the time of his injury, and asserted that, by reason of such fact, the Court had no jurisdiction under the Employers' Liability Act. It further alleged that respondent was an inhabitant of the Eastern District of Virginia, and that, so far as jurisdiction might depend on the fact that the suit arose under the Federal Safety Appliance Act, it could not be brought in any other district than that whereof respondent was an inhabitant (R. 17).

The second paragraph of the plea in abatement was directed to the second paragraph of complaint. It denied that Moore was a resident of Fort Wayne or a citizen of Indiana. It further alleged, however, that respondent was an inhabitant of the Eastern District of Virginia, and

that the action, arising under the act of Congress, commonly known as the Safety Appliance Acts, could not be brought by any original process or proceeding in any district other than the Eastern District of Virginia (R. 14).

The District Court sustained a demurrer to the first paragraph of the plea in abatement (R. 20). A preliminary hearing was had before the Court on the second paragraph of the plea, resulting in a finding and ruling against the respondent (R. 20, 37).

The sustaining of the demurrer to the first paragraph and the ruling on the second paragraph of this plea to the jurisdiction were assigned as error in the Circuit Court of Appeals (R. 115). The case was submitted to the jury on the complaint and an answer in denial.

There was no substantial dispute in the evidence as to the interstate or intrastate character of Moore's employment. Respondent maintains at Russell, Kentucky, a terminal, including a classification and assembly yard for the switching of cars and trains, and within the limits of these terminal yards both tracks and shops for the repair of cars (R. 50, 55, 65, 77). Within and on the south side of the yards, and abutting on the north corporate line of a village called Raceland (R. 65), is what is known as the light side shop repair yard, consisting of five tracks, numbered from 1 to 5. Upon these tracks are placed cars requiring light or running repairs (R. 43, 50, 79).

On the evening of November 27, or the morning of November 28, 1930, twenty-one cars were placed on repair

track No. 2. Twenty were empty coal cars which had arrived at Russell in different trains at various times between November 19th and November 27th (R. 45, 49, 62, 70). Empty coal cars are brought to Russell for breaking up and assembly. They have no destination other than Russell. Cars that are "shopped" by the inspectors are switched out. Those in condition for road service are classified on various yard tracks and lined up preparatory to leaving. At such time it is not known where they will go, whether within or without the State of Kentucky. In like manner, when cars are switched off the light repair tracks and classified as good-order cars, setbacks and cars for the shops, it is not known whether the good-order cars will go to West Virginia or Kentucky. They are assembled into trains and their destination is then determined by the chief car distributor (R. 74, 77).

The remaining car and the most westerly one in the cut was C. & O. 61355, loaded with sand, en route from Vauces, Ohio, to Surveyor, West Virginia. It received repairs occupying a few minutes some time between 7:30 a. m. and 4 p. m. on November 28th (R. 65), and was shown to have left Russell at 6:45 p. m. on November 28th by the report of the conductor of the train in which it was moved. It was set out at Barboursville, West Virginia, its train proceeding on to Hanley, West Virginia, some sixty-five miles east of Barboursville, where it arrived at 12:35 a. m. on November 29th. The car was shown to have left Barboursville in a train which left Huntington at 6:35 a. m. on

November 29th by the car report of the conductor of that train, and to have arrived at Hanley, West Virginia, at 4:55 p. m. on that day. It left Hanley at 8 a. m. on December 3rd, was set out at Quinnamont, and left that place at 1 p. m., arriving at Rowley at 2:30 p. m. It left Rowley at 4 p. m. and arrived at Mobscott at 6:25 p. m., all on December 3rd, and finally arrived at Surveyor at 1 p. m. on December 4th. Its presence in each of the various trains was shown by the car reports of the various conductors (R. 69, 70).

On the extreme west end of the cut, after the removal of car C. & O. 61355, and directly in front of the engine, were H. V. 21342 and C. & O. 33555 (R. 49). They were inspected on the shop track at Parsons yard, Columbus, Ohio, on November 26th and November 24th, respectively, and were ordered sent to the Russell car shops for the repair of their sills, as indicated by cards called "B. F. 4" cards, tacked on the cars and containing information that they were consigned to C. V. Ratcliffe, who was the foreman of the Russell car shops, by order of C. F. Ehrman, car foreman at Columbus. It was the practice, after such cars arrived at Russell, for those there in charge to use their judgment as to making repairs (R. 38, 39). A car might be consigned to the shop on account of a break in a sill without the break being a serious one, and the extent of the break would determine whether the car was to continue in service without being first repaired (R. 95).

These cars arrived at Russell at 12:15 p. m. on Novem-

ber 27th (R. 70), and they were among the cars placed on shop track No. 2 on the evening of that day or the morning of November 28th. No repairs were made to them while they were on the shop track (R. 47, 63), and they were not, in fact, taken to the Russell shops (R. 94). They left Russell in a train at 3:10 p. m. November 29th, and arrived at Logan, West Virginia, at 10:20 p. m. on that day (R. 70).

Light running repairs were made to some fifteen of the remaining cars; one was marked "set back" and the balance were ordered to the shops for heavy repairs or paint jobs (R. 45, 46, 47).

Between 5 and 6 o'clock on the morning of November 29, 1930, the crew of which Moore was a member began the task of switching from shop track 2 this string of empty cars. They were not making up trains, but were doing yard switching or classifying cars. The cars were then not coupled together. The knuckles on the couplers were first opened. The engine entered the track and coupled onto the west end of the cut. As a result of this impact the cars were coupled together and the engine backed out onto the lead, pulling the cars (R. 51, 55, 71, 74). The coupling apparatus of every car properly performed its function. The cut was shoved eastwardly and Burkhardt, the other brakeman, cut off the first car. The cars were again started in response to a signal from Burkhardt, which Moore transferred, and the latter attempted to cut off the second car, 58038, by pushing down the un-

coupling lever on the forward end of the south side of the third car, 54069 (R. 53, 71, 74). He became unbalanced and his hand was thrown under the wheel and mangled, resulting in its amputation (R. 53). The cars were not uncoupled (R. 53).

The lever in question was a push-down type lever (R. 53). A device called a lock block works up and down inside the coupler. When this lock block drops down it catches the lip of the knuckle and holds it in place. When it is raised it releases the knuckle and permits the cars to uncouple. The height of the lock block is about eight inches and that of the coupler in which it travels about twelve inches, permitting an up-and-down travel of the lock block of about four inches. Connected to the lock block is a rod called a lock lift, which extends through a hole or slot in the top of the coupler one and one-fourth inches wide and two inches long. The lateral dimensions of the lock block are two and one-half inches by four or five inches, or about twice the dimensions of the hole through which the lock lift travels. The lock lift has a hole or eye in the top, through which the lever runs. The lever is in two pieces, or arms, of about equal length, attached to a single trunnion or lug, which is fastened to the end sill. The inner end of the outer arm extends some four inches past the trunnion and fits underneath the inner arm, so that when the handle at the outer end of the outer arm is pushed down it turns on the trunnion and that part extending inside

the trunnion is raised, lifting with it the inner arm, which likewise turns on the trunnion, thereby raising the lock lift and lock block, releasing the knuckles and permitting the cars to uncouple. The upward movement of the lock block in the coupler is arrested when it comes in contact with the top of the inside of the coupler (R. 52, 53, 56, 57, 84, 85, 88, 91, 94).

Attached to the end sill, to which the trunnion is attached, but toward the center, is a U-shaped piece of metal called a stop. It extends out over the inner arm of the lever. Its purpose is to prevent the inner lever from going higher in case the connection between the lock block and the coupler is broken. There is a slight clearance between the stop and the lever when the lock block is raised to where its upward motion is arrested by coming in contact with the top of the inside of the coupler. The stop is not intended to arrest the movement of the lever and serves no purpose so long as the lever is connected to the lock block, but is an additional safety device to prevent the inner lever from continuing to go up and the outer lever from continuing to go down should the connection between the lock block and the inner lever be in any manner broken (R. 80, 81, 83, 85, 88, 92, 95).

It was the petitioner's contention that this stop is intended to arrest the upward movement of the lever before the lock block comes in contact with the top of the inside of the coupler (R. 54, 57), and that this stop was bent upwards so that there was three or four inches

clearance between the stop and the lever (R. 54). The respondent's witnesses testified that there was a curve or bend in the stop, but that this was its original shape (R. 80, 85, 88).

Regardless, however, of whether the upward movement of the lever is arrested by the stop or by the lock block coming in contact with the coupler before the lever reaches the stop, it was undisputed that, the trunion on which the lever turns being midway between the end of the handle of the outer lever and the point where the lock pin fits on the inner lever (R. 53, 92), neither the downward movement of the handle nor the upward movement of the inner lever could exceed the difference between the height of the coupler and the height of the lock block which worked entirely inside it. This is a distance of not to exceed four inches (R. 57).

The connection between the lever and the lock block was not broken. Nothing defective about the coupling apparatus was observed at about 7 o'clock on the morning of the accident (R. 75), and at about 9 o'clock the lever was inspected and operated by three witnesses, and in each instance the lock block was raised and the knuckle released by shoving down on the handle of the lever. There was no indication, in the way of tool marks or otherwise, that any change had been made, the exposed nuts and ends of the bolts being somewhat rusted (R. 84, 88, 91, 92). Other tests were made on the same day and on the second day following, and in each instance the lever

and coupler operated perfectly. No difficulty was experienced in operating the lever and effecting an uncoupling without the necessity of anyone going between the cars (R. 79, 80, 81, 82, 83).

The petitioner testified that on the occasion in question he took hold of the handle of the lever and shoved it down, and that it made a drop of two feet at least, and to a point within twelve inches of the rail, thereby unbalancing him and pulling his body between the cars (R. 53).

The distance of the handle of the lever above the rail when the lock block had released the knuckle was accurately measured at about 9 o'clock on the morning of the accident, while the car was standing on a curve. The measurement was eighteen and one-half inches with the lock block fully raised and the handle of the lever pushed and held down as far as it would go (R. 85, 89, 91). In February it was again measured, while the car was standing on level track, and the distance to the rail from the point to which the handle descended measured twenty inches, with no one, however, holding or pressing down on the lever (R. 92, 94). It was again measured on level track on April 11, 1931, and the distance from the handle to the rail, with the handle held down, measured nineteen inches (R. 85, 86, 89, 92, 94, 95). The difference in the three measurements was accounted for by the fact that in one instance the car was on a curve and in another instance no one was pressing down on the lever. In each instance the distance traveled by the handle of the lever

from its position with the lock block down and the handle up to its position with the lock block up and the handle down was approximately four inches, or the limit of the travel of the lock block in the coupler (pages above noted).

There was introduced in evidence a statement of the yard conductor, in which he said that the lever was "too low." He did not appear to have made any measurements; said that he did not recall saying and did not know that it was too low, and testified that it was not any lower than other cars (R. 76).

Certain curves or bends, both vertical and lateral, are fabricated into all levers, including the one in question. In addition to these bends, there was a slight bend in this lever which had resulted from use. This bend, however, was a lateral one. It did not result in bringing the handle nearer the rail, and it did not interfere with the operation of the lever or render it unsafe (R. 85, 89, 91, 95).

A number of photographs of the car and its coupling apparatus were introduced in evidence, in which the lever appeared at various heights in relation to other objects shown in the pictures, all depending upon the elevation and position of the camera at the time the photographs were taken (R. 96, 97).

At the conclusion of the evidence respondent moved the Court to direct the jury to return a verdict in its favor, for six reasons, which might be summarized as follows:

(1) There was a want of jurisdiction in that:

(a) There was no evidence that petitioner was engaged in interstate commerce, thus precluding a recovery on the first paragraph of complaint.

(b) There could be no recovery on the second paragraph because the action was brought in a district other than that of respondent's residence.

(2) The evidence was insufficient to establish that petitioner's injury was due to any negligent or unlawful act of respondent (R. 98).

This motion was overruled (R. 99), and the Court refused to withdraw either paragraph of complaint from the jury, but charged the jury on both paragraphs (R. 99, 101). The jury returned a general verdict in favor of the petitioner (R. 22). There was nothing to indicate upon which paragraph of complaint it was based nor upon which of the alleged negligent or unlawful acts it was predicated.

The ground upon which petitioner primarily sought to charge respondent with responsibility for his injury was that respondent had violated two specific requirements of the order of the Interstate Commerce Commission promulgated pursuant to the provisions of the Safety Appliance Act in that it unlawfully and negligently used and permitted to be used on its railroad a car (1) equipped with a "push-down" type of uncoupling lever, the handle of which, when operated in the normal way, descended to a

point less than eighteen inches from or above the top of the rail without causing the "lock-block" or pin to release the knuckle; and (2) equipped with a "push-down" type of uncoupling lever, the handle of which, when operated in the normal way, dropped more than fifteen inches over all (R. 5, 10).

The Court, after refusing all instructions tendered by respondent, charged the jury, in part, as follows:

> "He (the plaintiff) also charges that the defendant used the same push-down type of uncoupling lever and handle of the lever which when operated in the usual, normal and ordinary way dropped fifteen inches over all." * * *
>
> "The first count or the first paragraph of the complaint is based on what we call the Safety Appliance Act."
>
> "Under the first paragraph of the complaint if you find there was a violation of the Safety Appliance Act and that the plaintiff and defendant were engaged in interstate commerce and that the plaintiff's injury was the proximate result of the violation of the Safety Appliance Act the plaintiff would be entitled to recover."
>
> "The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all." * * * "The serious ques-

tion in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the plaintiff's injury was the proximate result of such violation, then the plaintiff is entitled to recover in this case" (R. 101, 102, 103).

Respondent at the time specifically excepted to the portion of the charge above quoted in the following words:

"The defendant excepts to the refusal of each of the instructions tendered by it and further excepts to that portion of the Court's charge wherein the jury are told that they are entitled to award a recovery if the lever in question dropped more than fifteen inches over all, for the reason that there is no provision in the Safety Appliance Act, or any regulation promulgated thereto by the Interstate Commerce Commission which contains any such requirements with reference to the lever as described in the complaint, and also described in the evidence" (R. 105).

SPECIFICATION OF ERRORS.

The errors, assigned in the Circuit Court of Appeals, which are hereby urged as grounds for the reversal are that

The District Court erred in:

(a) Sustaining petitioner's demurrer to the amended first paragraph of respondent's plea in abatement (R. 17, 19, 20, 115).

(b) Finding against respondent on the second paragraph of its plea in abatement (R. 14, 20, 36, 37, 115).

(c) Overruling respondent's motion to direct a verdict in its favor (R. 21, 22, 117).

(d) Giving to the jury the portions of the charge quoted in the "Statement of the Case" herein (R. 101, 102, 103, 105, 119).

SUMMARY OF ARGUMENT.

POINT I. **Upon certiorari the entire record is before the Supreme Court, not merely for a consideration of points raised by petitioner, but to the end that it may enter the judgment which should have been rendered by the court below on the record then before it.**

POINT II. **The first paragraph of the plea in abatement stated facts showing an absence of jurisdiction over the first paragraph of complaint and the demurrer thereto was erroneously sustained.**

POINT III. **The District Court erred in finding against respondent on the second paragraph of its plea in abatement challenging the Court's jurisdiction over the second paragraph of complaint for the reasons that:**

(a) The suit arose under the Safety Appliance Act, a law of the United States, and the jurisdiction of federal courts generally thereby attached.

(b) Diversity of citizenship was not the sole ground of federal jurisdiction, and the action could consequently be maintained only in the district of respondent's residence.

POINT IV. **A verdict for respondent should have been directed because the evidence failed to show that petitioner was engaged in interstate commerce, and only by**

proof of this fact could the suit be brought within the Court's jurisdiction.

POINT V. A verdict for respondent should have been directed, because the only evidence upon which a verdict for petitioner could rest was his own testimony, which was in direct conflict with undisputed physical facts.

POINT VI. The District Court erred in charging the jury that the Safety Appliance Act and the rules of the Interstate Commerce Commission required that the handle of the "push-down" type of uncoupling lever in controversy should have a maximum drop of fifteen inches and that if respondent violated this requirement as to the maximum movement of such handle the petitioner was entitled to recover, for the reason that no such requirement was contained either in such act or such rules.

ARGUMENT.

POINT I.

Upon Certiorari the Entire Record Is Before the Supreme Court, Not Merely for a Consideration of Points Raised by Petitioner, but to the End That It May Enter the Judgment Which Should Have Been Rendered by the Court Below on the Record Then Before It.

In the consideration of the appeal from the judgment of the District Court, the Circuit Court of Appeals felt compelled to go no farther than to pass upon certain questions of jurisdiction, which, it concluded, necessitated a reversal of the judgment. The scope of the inquiry in the Supreme Court, however, is not limited to such questions. If there was assigned, in the Circuit Court of Appeals, any error for which the judgment should have been reversed, the judgment of reversal will be upheld, whether such error was overlooked, ignored or its consideration deemed unnecessary because of the necessity of a reversal on other grounds.

Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 560;
Langness v. Green, 282 U. S. 531, 536;
U. S. v. American Railway Express Co., 265 U. S. 425 436.

POINT II.

The First Paragraph of the Plea in Abatement Stated Facts Showing an Absence of Jurisdiction Over the First Paragraph of Complaint, and the Demurrer Thereto Was Erroneously Sustained.

The first paragraph of the complaint expressly invoked the jurisdiction of the District Court upon two separate grounds. It was alleged that the defendant was engaged and that plaintiff was employed in interstate commerce, and that the action was brought under and by virtue of an act of Congress known as the Federal Employers' Liability Act. It was further alleged that the action was brought under an act of Congress known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, and that this act also gave the Court jurisdiction to hear and determine the cause of action. The respondent was charged with the violation of the Safety Appliance Act and such rules and orders in some six particulars.

The first paragraph of the plea in abatement met the first ground of federal jurisdiction, namely, that the suit was within the Employers' Liability Act, with a challenge to the jurisdiction of federal courts generally over the cause of action by specifically denying each and all of the allegations of the complaint to the effect that the plaintiff was engaged in interstate commerce. It met the second

ground of federal jurisdiction, namely, that the suit arose under the Federal Safety Appliance Act, not by questioning the jurisdiction of federal courts generally over the cause of action, but by insisting that, by reason of the fact that the respondent was an inhabitant of the Eastern District of Virginia, the venue was improperly laid and the District Court was without jurisdiction because of the provisions of 28 U. S. C. A. 112 (a), providing that: "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is no doubt true that the defense that the Court was without jurisdiction because the plaintiff was not, in fact, engaged in interstate commerce, challenging, as it did, the jurisdiction of federal courts generally over the cause of action, could have been raised at any stage of the proceedings. The defense that, in so far as jurisdiction depended upon the fact that the suit arose under the Safety Appliance Act, the same could be brought only in the district of the defendant's residence, was a defense questioning the territorial jurisdiction or venue of the court below, and would have been waived had it not been interposed at the first opportunity. Section 389 of Burns' Annotated Indiana Statutes 1926, made applicable by the Practice Conformity Act (28 U. S. C. A. 724), provides:

"Pleadings denying the jurisdiction of the Court,

> or in abatement of the action and all dilatory pleadings, must be supported by affidavit. * * * An answer in abatement must precede, and cannot be pleaded with, an answer in bar, and the issue thereon must be tried first and separately."

It was held by this Court in Gilbert v. David, 235 U. S. 561, 567, that:

> "It is the duty of the defendant to bring the matter to the attention of the Court, in some proper way, where the facts are known upon which a want of jurisdiction appears."

It was, therefore, proper for, and the duty of, the respondent, at the outset of the litigation, to raise the question that, by reason of the fact that the petitioner was not, in fact, engaged in interstate commerce, the Court was without jurisdiction on the first ground on which its jurisdiction was invoked. It was absolutely essential that respondent, before pleading to the merits, raise the question that, in so far as jurisdiction might depend upon the fact that the suit arose under the Safety Appliance Act, the District Court was without jurisdiction because the respondent was an inhabitant of another district.

Under the facts alleged in the first paragraph of the plea in abatement, and admitted by the demurrer, the Court had no jurisdiction over the first paragraph of complaint upon either of the grounds upon which its jurisdiction was sought to be invoked. In the face of this chal-

lenge to its jurisdiction, therefore, the District Court, at the outset, committed error in sustaining a demurrer to the paragraph of the plea in question and in assuming jurisdiction to try and determine the case.

The decisions of the Circuit Courts of Appeal are in harmony in holding that the question as to whether an employe is in fact engaged in interstate commerce is essentially a jurisdictional question.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 393, an action was brought against a Maryland railroad corporation in a Federal District Court in Ohio, where the defendant was doing business, in which it was alleged that the parties were engaged in interstate commerce. The plaintiff failed to prove that he was engaged in interstate commerce and the District Court directed a verdict for the defendant. The Circuit Court of Appeals for the Sixth Circuit held that:

> "The judgment should recite that the plaintiff was not engaged in inter tate commerce and that, for that reason, the case is dismissed for lack of jurisdiction in the Northern District of Ohio and without prejudice to a suit in the proper forum based upon any rights other than these given by the Employers' Liability Act."

In Aldredge v. Baltimore & O. R. Co., 20 F. (2d) 655, an action was brought in a state court in Missouri to recover damages, it being alleged that the plaintiff was

employed by the defendant in interstate commerce. The defendant removed the case to a United States District Court in Missouri on the ground of diversity of citizenship, and in its petition for removal denied that the plaintiff was employed by it in interstate commerce. The plaintiff filed in the federal court a motion to remand, in which he reiterated that he was employed by the defendant in interstate commerce. It was contended by the plaintiff that the federal court, in passing on the motion to remand, did not have jurisdiction to determine the question as to whether or not the plaintiff was engaged in interstate commerce for the reason that that question went to the merits of his cause of action. The Circuit Court of Appeals for the Eighth Circuit held that, where the petition for removal traversed the allegations of the complaint, no issue was raised for determination on the motion to remand so far as the traverse related to facts alleged in the complaint which went to the merits of the cause, but that, in so far as the traverse related to facts which conditioned jurisdiction or removability, an issue was thus raised for determination. The Court say, on page 658:

> "If plaintiff was engaged in interstate commerce, his cause of action was within the Federal Employers' Liability Act and not removable. The decision of the question, however, would not in any sense determine the merits of plaintiff's cause of action. It was a proper question for the Court to determine on the motion to remand. Our conclusion is that the federal

court had jurisdiction to determine the question whether the plaintiff at the time of the accident was engaged in interstate commerce."

Since the question as to whether the petitioner was, in fact, engaged in interstate commerce was the question upon which the trial court's jurisdiction over the cause stated in the first paragraph of complaint depended, it was respondent's right, if indeed it was not its duty, to raise the question at the outset of the litigation by a plea denying that the petitioner was so engaged. Since the truth of the allegations of this paragraph of the plea was, so far as the question of jurisdiction was concerned, admitted by the demurrer, the District Court erred in sustaining the demurrer and in proceeding to try the cause.

POINT III.

The District Court Erred in Finding Against Respondent on the Second Paragraph of Its Plea in Abatement Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint for the Reasons That:

(a) **The suit arose under the Safety Appliance Act, a law of the United States, and the jurisdiction of federal courts generally thereby attached.**

No possible doubt exists but that the action declared on in the second paragraph of the complaint arose under a law of the United States, namely, the Safety Appliance Act. The petitioner alleged: "That plaintiff brings this

action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States" (R. 7). It sought to charge respondent with a violation of this Act of Congress and such rules and orders of the Commission in some six particulars (R. 12).

45 U. S. C. A. 2, 15;
Order of Interstate Commerce Commission promulgated March 13, 1911.

It has been many times held, and never denied, that the Safety Appliance Acts give to an employe, injured as a result of their violation, a right of action for the injuries thus sustained.

In San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484, cited by petitioner, the following language from Texas & P. R. Co. v. Rigsby, 241 U. S. 33, is quoted:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted the right to recover the damages from the party in default is implied."

In Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, it is further said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employe; but the safety of employes and travelers is their principal object, and the right of private action by an injured employe, even without the Employers' Liability Act, has never been doubted."

In Central Vermont Ry. Co. v. Perry, 10 F. (2d) 132, 133, cited by petitioner, it is said:

> "The Safety Appliance Act supplementing and enlarging the provisions of the Act of March 2, 1893, all of which were enacted 'to promote the safety of employes and travelers upon railroads,' impose an absolute duty upon common carriers by rail to equip their cars with certain appliances and their locomotives with safe and suitable boilers and appurtenances, and although these provisions of law do not in express terms confer a right of action upon an employe injured because of a failure to comply with such requirements, it has been held that by implication they give him a right of action for personal injuries not resulting in death."

To the same effect is Director General v. Ronald, 265 Fed. 128, 147, likewise cited by petitioner, in which it was held that the plaintiff might recover irrespective of his engagement in interstate commerce. The following language is used in the concurring opinion:

> "Liability is expressed and fixed by the statute (Safety Appliance Act) itself and is to be found therein."

It follows from the foregoing authorities that an action by an employe for personal injuries, resulting from an alleged violation of the Safety Appliance Act on the part of his employer, is conferred by and necessarily arises out of that act. This being true, jurisdiction to hear and determine such a cause of action is conferred upon the federal district courts by the express provision of 28 U. S. C. A. 41 (Judicial Code, Section 24), which provides:

> "The district courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and arises under the Constitution or laws of the United States."

The second paragraph of complaint, by expressly alleging that the action was brought under the Act of Congress commonly known as the Safety Appliance Acts and by seeking a recovery on no grounds other than an alleged violation of that act, clearly invoked the jurisdiction of federal courts on the ground that the action was a suit of a civil nature arising under a law of the United States.

(b) **Diversity of citizenship was not the sole ground of federal jurisdiction, and the action could consequently be maintained only in the district of respondent's residence.**

The venue of the suit stated in the second paragraph of complaint is controlled by the general venue provision

of 28 U. S. C. A. 112 (a) (Judicial Code, section 51, amended), which provides:

> "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Respondent, appearing specially, filed its plea in abatement to the jurisdiction of the Court (R. 14), in which it alleged that it was at all times "an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of an act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia, whereof it is an inhabitant as aforesaid."

The fact that respondent was an inhabitant of Virginia was admitted by the complaint and established by the evidence, and, in finding against the respondent upon and in overruling this paragraph of its plea in abatement, the

District Court committed error, for which its judgment was necessarily reversed by the Circuit Court of Appeals.

It is true that the petitioner also invoked the jurisdiction of the District Court over the action declared upon in his second paragraph of complaint upon the ground of diversity of citizenship by alleging that he was a citizen of Indiana and respondent a citizen of Virginia. He alleged that he was a resident of, and that respondent was doing business in, the Ft. Wayne Division of the Northern District of Indiana, and claimed the right to there maintain the action under the authority of the exception contained in the section last quoted, authorizing the suit to be brought in the district of the residence of either the plaintiff or defendant. This he manifestly could not do because jurisdiction was not founded only on the fact that the action was between citizens of different states, but also upon the further fact that the suit arose under a law of the United States.

It has been many times held that where an action is within the general jurisdiction of the federal courts, both upon the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which the defendant is an inhabitant.

McCormick Co. v. Walters, 134 U. S. 41, 43;
Re Keasbey & Mattison Co., 160 U. S. 221, 228, 229;
Whittaker v. Illinois Central R. Co., 176 Fed. 130 (E. Dist. La.);

W. H. Goff Co. v. Lamborn, 281 Fed. 613, 616 (C. C. A., 5th Cir.);
Trapp v. B. & O. R. R. Co., 283 Fed. 655;
Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206, 210 (C. C. A., 5th Cir.), affirmed 215 U. S. 501;
Newell v. Baltimore etc. R. Co., 181 Fed. 698, 699 (W. Dist. Pa.);
Smith v. Detroit etc. R. Co., 175 Fed. 506, 507 (N. Dist. Ohio);
Cound v. A. T. & S. F. R. Co., 173 Fed. 527, 532 (West. Div. Texas).

The fact that the petitioner alleged that he brought his action under the Employers' Liability Act of Kentucky, as well as under the Federal Safety Appliance Act, does not have the slightest bearing upon the jurisdictional question in controversy. In order that federal jurisdiction may attach to a suit arising under a law of the United States it is in nowise essential that the action shall be based **solely** on federal law or that the same may not in some of its aspects be affected or controlled by the common law or the statutory enactments of the states.

In Union Pacific R. Co. v. Myers, 115 U. S. 1, it was held that actions, some of them for personal injuries under the rules of the common law, arose under the laws of the United States by reason of the mere fact that the defendant corporations had been created by or were organized under acts of Congress. Manifestly, if a suit arises under a law of the United States merely because the defendant

is a corporation organized pursuant to such a law, an action such as the case at bar, which is brought to recover damages on account of the alleged violation by the defendant of a law of Congress claimed to have been enacted for the protection of the plaintiff, arises under the law in question. In deciding the case last cited, however, the Court, in referring to the decision of Judge Marshall in the case of Osborn v. The Bank of the United States, 9 Wheat. 738, say:

> "But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the Court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending upon such Constitution, laws or treaties."

The Court then quoted the following language of Chief Justice Marshall in the case last referred to:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

In Nashville v. Cooper, 6 Wall. 247, the Supreme Court used this language:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

See also:

New Orleans, N. & T. R. Co. v. Mississippi, 102 U. S. 135;
Cohens v. Virginia, 6 Wheat. 264;
Tennessee v. Davis, 100 U. S. 257.

On the very ground herein urged, namely, that the cause of action declared upon in the second paragraph arose, in whole or in part, under the Safety Appliance Act, thereby constituting a ground for federal jurisdiction other than diversity of citizenship, the Circuit Court of Appeals held that venue was in the district of the respondent's residence, and that the District Court erred in its ruling with respect to the second paragraph of the plea in abatement. It is said in the opinion (R. 137):

"We are convinced that appellee in his second paragraph attempted to state a cause of action under the Federal Safety Appliance Act as well as under the statutes of Kentucky, and he alleges facts therein, which, if true, constituted a ground for federal jurisdiction other than diversity of citizenship. * * * That being the case, jurisdiction and venue were in the district of appellant's residence and not in the Northern District of Indiana."

Any language in the opinion, to the effect that assuming (what the Court held not to be the fact) that this paragraph of complaint was based exclusively on the Kentucky statute, that act and the Safety Appliance Act cannot be considered pari materia because the latter act applies only to interstate commerce, is purely obiter dictum. If incorrect, as petitioner contends (Respondent's Brief, pp. 9, 26), it can be corrected in such opinion as this Honorable Court may render. It affords no ground for the reversal of the judgment of the Circuit Court of Appeals or the reinstatement of the judgment of the District Court.

POINT IV.

A Verdict for Respondent Should Have Been Directed Because the Evidence Failed to Show That Petitioner Was Engaged in Interstate Commerce, and Only by Proof of This Fact Could the Suit Be Brought Within the Court's Jurisdiction.

The question as to whether the plaintiff was engaged in interstate commerce is to be determined by the character of the work he was performing at the very moment of the injury. The fact that, prior to undertaking the task on which he was engaged, he may have been employed in interstate commerce, or that, upon completion of such task, he was expected to engage in another which would have been a part of interstate commerce, is wholly immaterial. The fact that cars which he assisted in moving had pre-

viously been employed in some interstate movement, or that they might subsequently be used in interstate commerce, would likewise be of no moment.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 476;
Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 178;
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 184;
Erie R. Co. v. Welsh, 242 U. S. 303, 305;
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77;
Chicago etc. R. Co. v. Ind. Com., 284 U. S. 296, 298;
N. Y. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420;
Mayor v. Central Vt. R. Co., 26 F. (2d) 905, 907 (S. Dist. N. Y.), affirmed 26 F. (2d) 907 (C. C. A. 2nd Cir.).

Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks. Further movement of these cars would not partake of interstate commerce until they had been definitely assigned to some interstate movement.

Pennsylvania R. Co. v. Knox, 218 Fed. 748, 749 (C. C. A. 3rd Cir.);
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A. 2d Cir.);
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A. 6th Cir.);

C. & E. R. Co. v. Feightner, 75 Ind. App. 677, 687, 114 N. E. 659;
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023 (affirmed 245 U. S. 629);
L. & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440;
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21, 22.

At the time of the plaintiff's injury it was not known whether the empty cars which he was engaged in switching would be placed in trains going outside the State of Kentucky or in trains moving wholly within the State of Kentucky, or whether they might be loaded with interstate freight or intrastate freight. Under such circumstances the switching of these empty cars did not partake of interstate commerce.

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805;
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 647;
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746, 748.

It is contended by petitioner that an interstate character was imparted to petitioner's work because the dominant purpose in the switching in which he was engaged was to reach the two most westerly cars in the cut, HV 21342 and C&O 33555, and take them to the shops for repairs, thus completing an interstate movement from Columbus, Ohio.

There was no such dominant purpose; these cars were not taken to the shops; and had they been taken there the movement would have been purely a local one.

The car which the petitioner was attempting to uncouple was at the extreme east end of the cut. HV 21342 and C&O 33555 were on the extreme west end of the cut and were already coupled onto the engine. The cars were on the shop lead, a track leading to the shop (R. 51, 74), and the shops were located a mile to the west (R. 50). These two cars could obviously have been taken to the shops without the necessity of moving any other cars. The immediate work on which the petitioner was engaged was the uncoupling of two admittedly intrastate cars. This was an end in itself and was in no sense for the "dominant purpose" of "reaching" cars which were already attached to the engine.

> Shauberger v. Erie R. Co., 26 F. (2d) 297;
> Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 694.

Cars H. V. 21342 and C. & O. 33555 were not taken to the shops (R. 94), but left Russell at 3:10 p. m. on November 29 (R. 70).

Even had these cars been taken to the shops for repairs, their movement from the repair track, where they had been stored since their arrival some two days before, into the shop buildings would not, in any sense, have constituted interstate commerce. The Russell yards, embracing within their limits tracks on which cars were

inspected, tracks on which cars were classified, tracks on which cars were repaired and enclosed buildings in which cars were repaired, comprised the Russell terminal. The fact that representatives of the company at Columbus contemplated that the cars in question, after their arrival at Russell, would, if those there in charge saw fit, be taken, in the course of the progress of the work, into the shop buildings to be repaired, would not prolong their interstate journey over the period during which they might remain on storage or repair tracks or be in the course of removal from such tracks to the shop buildings. Russell was the destination of these empty cars. They had there arrived, and after being switched out of their train had been placed on shop track No. 2, for the purpose, either of inspection—to determine whether the repairs suggested at Columbus should be made, for repair—if it were found that repairs which could be made on that track were advisable, or for storage—to await their removal to the enclosed shops. In either event their interstate journey had ended. They were in no sense instrumentalities of interstate commerce, but were withdrawn from active service. Any subsequent movement from shop track No. 2, back over the route by which they had come, to the enclosed shops a mile or so to the west, would have been a purely local or switching movement.

Schauffele v. Director General, 276 Fed. 115, 116;
Grigsby v. Southern R. Co., 3 F. (2d) 988, 989; certiorari denied 268 U. S. 704;

Shanberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A., 6th Cir.);
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73, 74.

Petitioner contends, however, that the destination of these cars was "Raceland," and that having been switched out of their train at "Russell" they had not completed their journey. No such distinction can be made. The repair yards where they had been stored abutted on the corporate limits of the Village of Raceland, while the new shops were located a half mile west of Raceland (R. 65). The Town of Russell was located east of both the shops and the repair yards. The question cannot be determined by any narrow distinction between Raceland and Russell, because neither of these cars was billed to any station in the sense that loaded cars, moving under bills of lading, are transported from one station to another. They were sent to the Russell terminal in contemplation of the making of certain repairs in the event that, in the judgment of the company's officials at Russell, the same should be necessary. Having been there switched out of their train and placed on a storage or repair track, their interstate movement had terminated and any subsequent movement was local. Its character could not be altered by the opinion or conclusion of the witness Callahan or any other witness as to when and under what circumstances the cars arrived at their destination.

Petitioner further contends that these cars were "consigned" to C. V. Ratcliffe, the foreman of the Russell shops, and that, under the rule in Pennsylvania Co. v. Donat, 239 U. S. 50, their interstate journey was not complete until there had been a delivery to the consignee.

The question here presented is entirely different from that presented in a case as the Donat case, where loaded cars from another state are being switched onto a private switch for delivery to the consignee. In such a case it is universally held that their interstate movement does not terminate when they arrive at the yards and are switched out of their train, but continues until final delivery to the consignee. This is true for two reasons. In the first place, they are actually loaded with and carrying interstate commerce, and the cars themselves are devoted to that purpose. In the second place, the law definitely fixes the time of the delivery of an interstate shipment by the consignor to the carrier as the time of the commencement of the interstate movement of the shipment and the delivery by the carrier to the consignee as the termination of such movement. In other words, it is the transfer of possession from shipper to carrier which marks the beginning and the transfer of possession from carrier to consignee which marks the termination of the movement. As is said in Roberts on Federal Liabilities of Carriers, Section 539:

> "From the moment, therefore, that a shipment for a point in another state is accepted by a common car-

rier, that carrier is engaged in interstate commerce during the entire period from the time of acceptance at the point of origin until the shipment is finally delivered to and accepted by the consignee at the point of destination."

In the instant case there was no transfer of possession to mark the beginning or the end of the interstate movement of these cars. They were at all times in the possession of the respondent. No bill of lading was issued and no contract of any kind was entered into governing their movement. Ehrman and Ratcliffe were in no sense consignor and consignee. They acted merely as agents for the respondent. The fact that their names appear on the cards which were tacked onto the sides of the cars does not change the situation in the slightest degree. We submit it to be the law that when empty cars, in the possession of their owner, are sent from one state to a general terminal in another for repairs, their interstate movement terminates when they arrive at the terminal and are switched out of their train and placed on storage tracks to await their turn to be repaired. Their subsequent movement from the storage track to the particular place where the repairs are to be made is a purely local movement.

The only loaded car in the cut which was placed on shop track No. 2 on the evening of November 27th or the morning of November 29th was C. & O. 61355. This car left Russell, however, at 6:45 o'clock on the evening of November 28th. The petitioner was not injured until

about 6 o'clock on the morning of November 29th, and this car, consequently, could not have been in the cut of cars which was being moved. No doubt can exist but that this car left Russell at the time stated. This was shown by the wheel report of the conductor of the train in which it was moved. It may be urged that, because of the possibility of human error, the conductor may have been mistaken in including this car on his wheel report among those comprising his train. This might be true if the question were dependent wholly upon the correctness of a single wheel report. In the course of its movement over the main and branch lines of the defendant company from Russell to its destination at Surveyor, however, this car was moved by six different trains. The wheel reports of the conductors of each of those trains disclosed the presence of this particular car in their respective trains. It was set out from the train in which it left Russell at Barboursville, West Virginia, and picked up by a train which left Huntington at 6:35 a. m. on November 29th (R. 70). This could not possibly have happened had it still been at Russell, Kentucky, at the time of plaintiff's injury, and in like manner it would have been impossible for this car to have been in any of the trains in which it was shown to have been moved by the wheel reports, had any of these records been incorrect. The record of the movement of the car from Russell to point of destination was absolutely complete and consistent. It is utterly inconceivable that all six of the conductors could have made

a mistake in entering the same identical car on their wheel reports if it had not, in fact, been included in their trains.

Conley, the conductor of the switching crew, was shown the repair list of the twenty-one cars which were on shop track No. 2 at 9 o'clock on the morning of November 28th, and was asked whether those were the cars which were removed from that track on November 29th, and he replied in the affirmative (R. 4, 9, 75). His attention was not particularly directed to car C. & O. 61355, and he obviously intended to do no more than identify the list which had been made by the foreman of the repair gang as the list including the cars which he moved. He specifically stated (R. 75): **"These cars were empty."** His testimony cannot, therefore, be construed as saying that any car loaded with sand was included in those that he moved.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 389, relied upon by petitioner, an effort was made to show that certain cars, thereafter loaded and consigned for interstate shipment, were in the movement in connection with which the plaintiff was injured. The Court say:

> "But the evidence most clearly shows that none of these cars were in the Lumberport-Haywood movement; that they had been placed at the Dawson mine some hours before the accident. What there is in the testimony to throw any doubt on the certainty of this conclusion is so vague and inconclusive as to be negligible for any purpose. It is also shown that at about 10 o'clock, or about four hours after Rice's

injury and on the return trip of Rice's crew, seven empties were delivered to the Corona mine, which were loaded in the afternoon and thereafter weighed and billed and consigned for interstate shipment. The evidence that any of these Corona cars was in the cut at the time of the accident is so scant as to make such a conclusion very speculative: The fact question upon which there is even a conflict in testimony, being the existence of jurisdiction, should affirmatively and distinctly appear."

The petitioner seeks to gloss over the question as to whether the evidence, in fact, showed that he was engaged in interstate commerce by the statement, on page 23 of his brief, that the general verdict of the jury conclusively established in his favor the issue that he was employed in interstate commerce at the time that he sustained his injury. The record does not bear him out. There was nothing to indicate whether the jury's verdict was based on the first or the second paragraph of complaint. With equal plausibility, therefore, it might be said that the verdict conclusively established in his favor the issue tendered by the second paragraph of complaint to the effect that he was engaged, not in interstate, but in intrastate commerce.

POINT V.

A Verdict for Respondent Should Have Been Directed Because the Only Evidence Upon Which a Verdict for Petitioner Could Rest Was His Own Testimony, Which Was in Direct Conflict With Undisputed Physical Facts.

The case was recognized by the trial court (R. 103) as being bottomed on the theory that respondent was guilty of a violation of the Safety Appliance Act and orders of the Interstate Commerce Commission in the first two particulars charged in the complaint, that is, that the handle of the uncoupling lever descended to within less than eighteen inches of the rail and that this handle dropped more than fifteen inches over all.

The petitioner, in support of these allegations, testified that when he took hold of the handle of the lever it was three (3) feet above the top of the rail and that he pushed it down a distance of fully two (2) feet and to a point within twelve (12) inches of the rail (R. 53, 57, 58). It is, of course, the general rule that a court of error will not weigh conflicting evidence and that, where there is any evidence at all to support a verdict, the same will not be disturbed on appeal. There are, however, certain recognized exceptions to this general rule. One of these is that where the verbal testimony of a witness is in conflict with the undisputed physical facts such testimony is of no weight in support of the verdict.

Pennsylvania R. Co. v. Chamberlain, 53 S. Ct. Rep. 391, 394, 77 L. Ed. Adv. 503, 506;

Hickey v. Missouri P. R. Co., 8 F. (2d) 128, 131 (C. C. A. 8th Cir.);
Atchison etc. R. Co. v. McNulty, 285 Fed. 97, 101 (C. C. A. 8th Cir.);
Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557, 569 (C. C. A. 8th Cir.);
Southern R. Co. v. Smith, 86 Fed. 292, 296 (C. C. A. 5th Cir.);
Henry v. Providence etc. Co., 90 Atl. 168, 169 (R. I.);
Louisville etc. R. Co. v. Chambers, 165 Ky. 320, 178 S. W. 1041;
Hudson v. Rome etc. R. Co., 145 N. Y. 408, 40 N. E. 8, 9;
Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145;
McGlade v. City of Waterloo, 156 N. W. 680, 681 (Iowa);
Elliott on Railroads (3rd Ed. 1922), Sec. 2714, 26 R. C. L. 1070;
Larsen v. Northern Pac. R. Co., 241 N. W. (Minn.) 312, 313;
Hunter v. N. Y. etc. R. Co., 116 N. Y. 615, 23 N. E. 9, 10;
C. & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947;
Karras v. Great Northern R. Co., 167 Minn. 140, 208 N. W. 655, 656.

All of the physical facts with reference to the construction and manner of operation of the coupler and lever in controversy were undisputed and minutely described. The lever consisted of two pieces or arms, both attached to the end sill of the car on the same trunnion. The outer lever

extended inwardly a few inches beyond the trunnion and fitted underneath the inner lever. When the outer lever was pushed down it turned on the trunnion and raised the part extending past the trunnion, thereby raising the inner lever, which likewise turned on the trunnion. The two arms became, in effect, one lever. The inner arm was attached to a lift pin which passed through a hole in the top of the coupler and there connected with the lock block. When the lift pin and lock block were raised by the outer lever being pushed down the knuckles were released and the cars were permitted to uncouple. The inside vertical dimension of the coupler was approximately twelve (12) inches and the vertical dimension of the lock block was approximately eight (8) inches. The hole through which the lift pin entered the coupler was much smaller than the horizontal dimensions of the lock block, as a result of which the lock block could not come out of the coupler, but traveled entirely within it. The distance from the end of the handle of the outer lever to the trunnion was approximately the same as the distance from the trunnion to the point where the lift pin was attached to the inner lever. By the force of the most elementary principles of mathematics and physics, therefore, the handle of the outer lever could be pushed down only to the extent of the limit of the travel of the lock block in the coupler, or approximately a distance of four (4) inches. The petitioner was asked to explain how it happened that the handle of the lever de-

scended two (2) feet while the lock block was being raised four (4) inches. His explanation was as follows:

> "I know how it happened that the end of the lever was traveling two (2) feet while the lock block was traveling about four (4) inches; it depends on where it is coupled on the end sill and, the lever being bent, went on down. I didn't bend the lever any in the operation. The two arms of the lever must be about the same length; where they fastened on the end sill is about the middle of the distance from the knuckle lock to the end of the car; the outer end of the arm reaches past the lock to get the inner arm and this enabled the lever to travel down two (2) feet while the lock block was going up four (4) inches" (R. 58).

This explanation only manifested the utter impossibility of the petitioner's testimony being true. The location of the trunnion on the end sill would be wholly immaterial in determining the relative travel of the handle and the lock block so long as the two arms of the lever were of equal length. The fact that the lever may have been bent would likewise have no bearing on the extent of its travel compared with the limit of the travel of the lock block, so long as it was not bent in the operation. This, the petitioner says, was not done (R. 58). The truth is that the petitioner labored under the belief that a rule of the Interstate Commerce Commission provided that this handle should not descend more than fifteen inches and he testified that it went down two feet for the purpose of estab-

lishing a violation of that rule, when the admitted physical facts were such that a descent of the handle any such distance was utterly impossible. The petitioner's very explanation was self-destructive. As was said by the Supreme Court of Wisconsin in Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145:

> "The testimony of a witness or finding of a jury, contrary to the unquestionable physical situations, or common knowledge, or conceded facts, is of no weight in favor of the side it is invoked to support, while it may be self-destructive—be successfully impeached by its utter improbability or impossibility."

The mute evidence of these physical facts was supported by the testimony of many witnesses. On the morning of the accident the coupler was tested and operated and measurements were taken. It not only operated perfectly and effected an uncoupling of the cars without difficulty, but the difference between the elevation of the handle with the lock block down and the handle up, and its elevation after the handle had been shoved down and the lock block raised, was found to be approximately four inches or the limit of the travel of the lock block in the coupler. Similar measurements and tests were made on subsequent occasions and always with the same result. The case, therefore, is one coming squarely within the rule above referred to. The rule is stated in Elliott on Railroads (3rd Ed., 1922), Section 2714, in the following language:

> "Notwithstanding the general rule, which prevails in most jurisdictions, that the Court, on appeal, will not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue and the verdict unjust and unsupported in law and in fact."

This rule has been frequently applied in the federal courts. It is announced in Hickey v. Missouri P. R. Co., 8 F. (2d) 128, 131 (C. C. A. 8th Cir.), as follows:

> "It must be conceded that, on the motion for a directed verdict, plaintiff was entitled to have taken in his behalf the most favorable view of the testimony. He was not entitled, however, to have credence given to testimony if it conflicted with plain physical facts. His claim that he looked at a certain point, and that no train was in sight, will not be given credence if the mathematical facts in the testimony given in his own behalf demonstrate the unsoundness of his claim."

We submit, therefore, that the petitioner's testimony that the handle descended a distance of two feet and to within twelve inches of the rail, being indirect conflict with undisputed physical facts, is of no weight in support of the verdict, and that this is especially true in view of the petitioner's explanation which is above set out. The testimony of every witness who measured the height of the handle of the lever above the rail or saw it measured

was to the effect that it did not come within eighteen inches of the rail, and in the absence of any credible testimony to the contrary the testimony of these witnesses must be taken as true.

It is true that a number of photographs of the car, with the coupler and lever attached, were introduced in evidence. They were before the Circuit Court of Appeals as physical exhibits. In some of the photographs the lever appears to be much lower with reference to other objects shown in the photograph than in some of the other pictures.

It is self-evident that the relative height on a photograph of two objects located at unequal distances from the camera depends almost altogether on the position of the camera at the time the picture is taken. If the lens of the camera is higher than a given object, that object will appear in a lower position in the picture than it actually is with reference to other more distant objects. This is borne out by the testimony of a number of witnesses, including a professional photographer. Credible evidence of accurate measurements of the distance of this lever above the rail cannot be impeached or contradicted by photographs which furnish no more than a basis for guesswork as to the height of the lever above the rail.

It might be contended that the handle of the lever was permitted to descend a distance of two feet because the "stop" above the inner lever, which respondent claimed was designed to arrest its upward movement was, as he

contended, bent upwards, so that there was three or four inches clearance between the stop and the lever. The lock block, in its upward movement in the coupler, necessarily comes to a halt when it comes in contact with the top of the coupler. If the "stop" is so placed as to arrest this upward movement before the lock block meets the top of the coupler the limit of travel of the lock block and consequently that of the handle of the lever is reduced below the four inches permitted by the inside dimensions of the coupler. If the "stop" is not so placed the lock block could move upwardly and the handle of the lever could move downwardly, or inwardly for that matter, only the four inches permitted by the limit of movement of the lock block in the coupler.

The four remaining violations of the Safety Appliance Act which are alleged in the complaint to have been the proximate cause of petitioner's injuries are: That the lock pin was prevented from releasing the coupler and uncoupling the cars by reason of the bent, twisted and defective condition of the lever; that the coupler was prevented from uncoupling the cars without the necessity of a man going between the ends of the cars by reason of such condition of the lever; that the coupler could not be uncoupled without the necessity of a man going between the cars, and that the couplers did not couple automatically by impact.

It was apparently the theory of the first three of these charges that the failure of the cars to uncouple was the

cause of the accident, presumably on the ground that the plaintiff was obliged to go between the cars to effect the uncoupling by some means other than the operation of the lever. It was the theory of the last charge that the failure of the cars to couple automatically by impact was in some manner responsible for the accident.

So far as this last charge is concerned, there is not the slightest evidence that the cars ever failed to couple by impact. They had been coupled together in this manner immediately before they were removed from shop track No. 2. Furthermore, the plaintiff was not engaged in any attempt to couple the cars, and their inability to couple automatically by impact, even if such condition had existed, could have had no possible connection with the accident.

Nor was there any evidence that any failure of the cars to uncouple was in any way responsible for the accident. Neither the petitioner nor anyone else went in between the cars to effect an uncoupling. The petitioner made but the one attempt to uncouple the cars, and that attempt was made by pushing down on the lever as he walked or ran beside the train (R. 58). The forward car, it is true, was not in fact uncoupled at the time the plaintiff attempted to operate the lever. That fact, however, is not sufficient to establish any defect in the coupler in the face of the testimony that after the accident the coupler was subjected to repeated tests and that in each instance the cars were properly uncoupled (Curran v. Chicago Short

Line Ry. Co., 198 Ill. App. 154, writ of error dismissed 246 U. S. 655). The failure of the cars to uncouple, however, was not in the slightest degree responsible for the petitioner's injuries. He was operating the lever on the second car in an attempt to uncouple the leading car. It was the wheels of the second car which ran over his hand, and the fact that the leading car was still attached to the second car had no connection whatever with the accident.

Not only did no failure of the cars to couple or uncouple have any connection with petitioner's injuries, but there was no bend or defect in the lever which could have prevented a coupling or uncoupling of the cars or have been, in any other manner, responsible for the accident. The lever was not a straight piece of metal, but certain curves and bends were fabricated in it at the time it was manufactured. This was done in order to make it fit the end sill on the particular type of car to which it was applied. It was not disputed, however, that there did exist a further bend at the eye where the lever fitted over the trunnion. This bend, however, was a transverse or lateral bend which did not have the effect of making the handle come closer to the rail. It did not render the lever inoperative or make it dangerous. Its only effect was to throw the handle slightly forward and away from the end sill. The petitioner's own testimony with reference to this bend in the lever shows conclusively that it had nothing to do with the accident. He testified that he had not observed the bend when he first took hold of the lever with

his left hand, and that he experienced little difficulty in taking hold of it (R. 58, 59). If the lateral bend in the lever had been a matter of consequence, it would have thrown the handle into a position where he would not have expected to find it, and its condition would have necessarily been brought to his attention at the outset. Since he found the handle approximately where he expected it to be and had no difficulty in taking hold of it, its downward descent for the distance of the four inches permitted by the travel of the lock block in the coupler could not have had any possible connection with the accident. The bend could not possibly have prevented the lock block or pin from releasing the knuckle of the coupler or have prevented an uncoupling of the cars. Nor could the bent condition of the lever have prevented the coupler from being uncoupled without the necessity of a man going between the ends of the cars in order to effect the uncoupling. The lever and coupler were operated time and again after the accident, without any change or repairs having been made, all without the necessity of any man going between the ends of the cars.

The respondent, of course, was not called upon to explain the exact manner in which the accident occurred. The petitioner may have missed the lever altogether. His hand may have slipped off the handle. He may have stumbled as he walked or ran beside the train. The accident may have occurred in many ways, but it is certain that the record in this case contains no credible evidence that the

defendant was guilty of any of the violations of the Safety Appliance Act or the orders of the Commission mentioned in the complaint or that any such violation was in any way responsible for the petitioner's injury.

POINT VI.

The District Court Erred in Charging the Jury That the Safety Appliance Act and the Rules of the Interstate Commerce Commission Required That the Handle of the "Push-Down" Type of Uncoupling Lever in Controversy Should Have a Maximum Drop of Fifteen Inches and That if Respondent Violated This Requirement as to the Maximum Movement of Such Handle the Petitioner Was Entitled to Recover, for the Reason That no Such Requirement was Contained Either in Such Act or Such Rules.

In the course of the Court's charge the jury were told that the respondent was charged in the complaint with using a push-down type uncoupling lever and handle thereof, which, when operated in the usual way, dropped more than fifteen inches over all; that a rule of the Interstate Commerce Commission provided that handles of uncoupling levers should have a minimum drop of twelve inches and a maximum of fifteen inches over all, and that the serious question in the case for the jury to determine was the question of whether or not the respondent violated the Safety Appliance Act in that it did not have an uncoupling lever that complied with the Safety Appliance Act and rules of the Interstate Commerce Commission

with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. They were further charged that if the respondent did violate that rule, or a provision of the Safety Appliance Act, and the petitioner's injury was the proximate result of such violation, then the petitioner was entitled to recover. In other portions of the charge the jury were told that under the Safety Appliance Act there was no question for them to consider with reference to either assumption of risk or contributory negligence. The jury were, therefore, told that if the handle of the uncoupling lever dropped more than fifteen inches the respondent had violated the provisions of the Safety Appliance Act and the orders of the Interstate Commerce Commission, and that if such violation was the proximate cause of the petitioner's injury he was entitled to recover.

The respondent excepted to this portion of the charge telling the jury that they should find for the petitioner if the lever in question dropped more than fifteen inches over all, for the reason that there was no provision in the Safety Appliance Act, or any regulation promulgated pursuant thereto by the Interstate Commerce Commission, which contained any such requirement with reference to this kind of a lever.

The order or rules of the Commission establishing standards for uncoupling levers was promulgated on March 13, 1911, and together with "Plate B," herein referred to, is as follows:

"Uncoupling Levers:

"Number: Two (2).

"Uncoupling levers may be either single or double, and of any efficient design.

"Dimensions: Handles of uncoupling levers, except those shown on Plate B, or of similar designs, shall be not more than six (6) inches from sides of car.

"Uncoupling levers of design shown on Plate B and of similar designs shall conform to the following prescribed limits:

"Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift arms shall be not less than seven (7) inches long.

"Center of eye at end of center lift arm shall be not more than three and one-half (3½) inches beyond center of eye of uncoupling pin of coupler when horn of coupler is against the buffer block or end sill. (See Pl. B.)

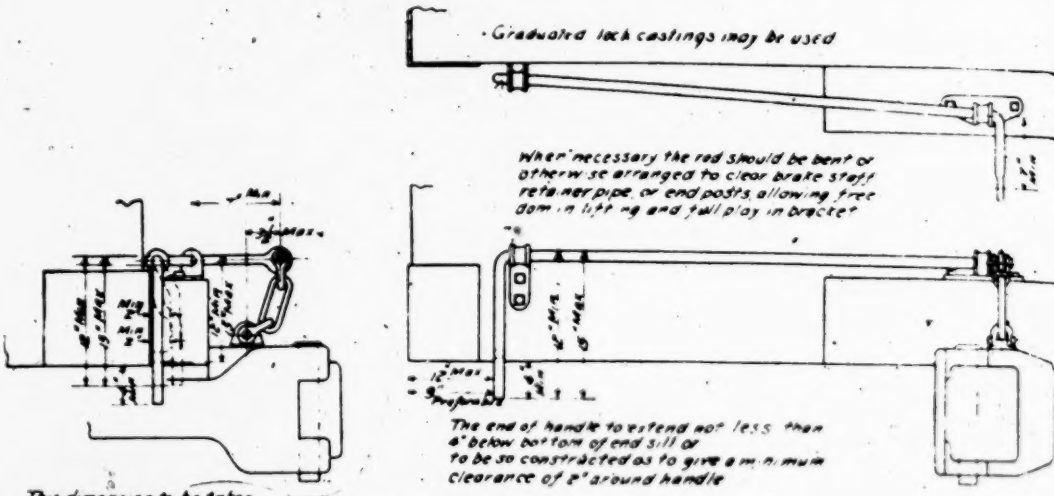
"Ends of handles shall extend not less than four (4) inches below bottom of end sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Pl. B.)

"Handles of uncoupling levers of the 'rocking' or 'push-down' type shall be not less than eighteen (18) inches from the top of rail when lock block has released knuckle, and a suitable stop shall be provided

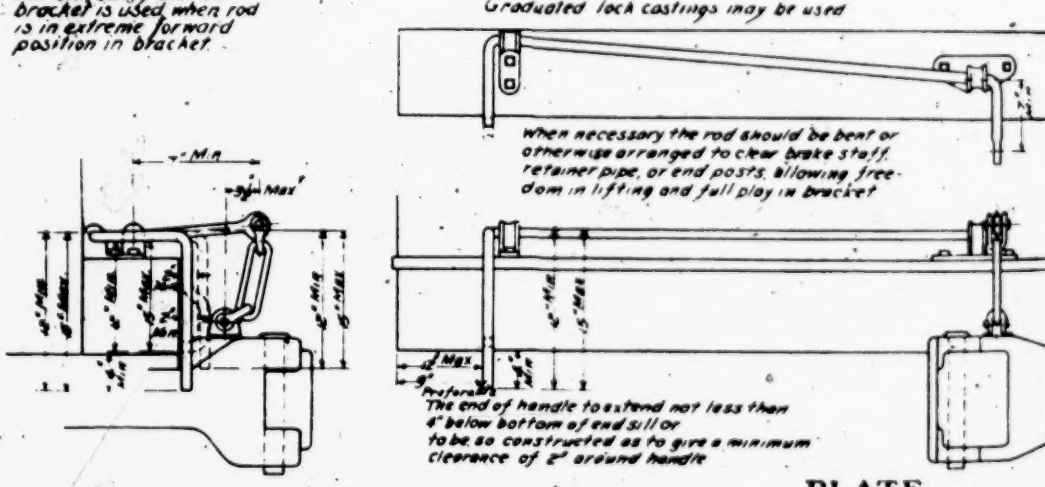
to prevent inside arm from flying up in case of breakage.

"Location: One (1) on each end of car.

"When single lever is used, it shall be placed on left side of end of car."



Application to concealed endsill cars



Application to outside endsill cars

PLATE B

It will be observed that this order deals with two separate and distinct types of uncoupling levers. One type is known as the lift-up type. This is the type which is shown on Plate B. With reference to this type of levers it is provided that "minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all." The order shows beyond all question that this provision applies only to the lift-up type of levers shown on Plate B, for the words "(See Pl. B)," follow immediately after the provision referred to. Following this provision there appear the requirements with reference to the handles of uncoupling levers of the "rocking" or "push-down" type. It is required that these shall not be less than eighteen (18) inches from the top of rail when lock block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage. As to these levers, there is no requirement whatever to the effect that the minimum drop of handles shall be twelve (12) and the maximum drop of handles fifteen (15) inches over all. Indeed, such a requirement would be impossible of fulfillment, because, owing to the fact that the travel of the handle of the lever is limited by the travel of the lock block in the coupler, which, as above explained, is approximately four (4) inches, it would be impossible to provide couplers having a minimum drop of twelve (12) inches. The Court did not stop at telling the jury that rules of the Interstate Commerce Commission required that this push-down type of lever

should have a maximum drop of fifteen (15) inches over all, when, in fact, the lever was subject to no such requirement whatever. He went further and told them that **the serious question in this case for them to consider was whether the respondent had violated this rule with reference to the maximum movement of the handle of the uncoupling device**, and that if it did violate it, the petitioner was entitled to recover. It will be recalled that the petitioner testified that the handle was three feet above the rail when he first took hold of it (R. 57, 58). In view of the testimony of many witnesses, testifying on behalf of respondent, to the effect that the handle was nineteen or twenty inches above the rail when the lock block had released the knuckle, there was ample evidence from which the jury might have concluded that the handle did descend more than fifteen inches and yet not come within eighteen inches of the rail. They might well have felt that, there being nothing to distract petitioner's attention at the time he first took hold of the lever, his recollection as to its height above the rail at that time was correct, and that accepting as true the testimony of respondent's witnesses as to its height above the rail with the lock block up and the handle down, there was still a violation of the requirement with reference to the fifteen-inch drop.

Should it be contended here, as it was before the Circuit Court of Appeals, that the effect of the charge was to impose upon petitioner the burden of proving both that the

handle dropped more than fifteen inches and that it came to within less than eighteen inches of the rail, the bare contention carries its own refutation. From the inception of the case the petitioner sought to recover on two principal grounds, namely, the first two alleged violations of the Safety Appliance Act set forth in each paragraph of his complaint. He charged that the handle of the lever descended to a point less than eighteen inches above the top of the rail and he charged that the handle of the lever dropped more than fifteen inches over all. The two charges were independent of each other and in no sense dependent upon each other. The handle of the lever might come within eighteen inches of the rail without descending as much as fifteen inches. It might descend fifteen inches without coming within eighteen inches of the rail. The Court, recognizing that the plaintiff relied primarily upon these two charges of negligence, emphasized them in equal degree by saying:

> "The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the petitioner's injury was the proximate result of such violation, then the

petitioner is entitled to recover in this case" (R. 103, 119).

The effect of this charge was not to tell the jury that the plaintiff could recover only in event that the defendant had violated both of the requirements referred to. A law, rule or order is, of course, violated if any of its provisions are violated. The very suggestion that anyone, lawyer or layman, would understand that a law or order could be violated only by violating each one of its provisions is so absurd as to require no further notice.

The fact that the giving of this charge was prejudicial and reversible error is so apparent that further argument or the citation of authorities would seem to be unecessary. The case of Davis, Director General, v. Manry, 266 U. S. 401, is, however, directly in point. In that case the trial court charged the jury that the Safety Appliance Act required that all cars having ladders should be equipped with grab irons; that this applied to a tender of a locomotive, though it had no roof, and that if the petitioner's injury was due to the absence of a grab iron he was entitled to a verdict. This was excepted to on the ground that the statute did not apply to ladders on a tender, and, as the Court said, "the issue there was as to the effect of the statute." This Court held that the provisions of the Safety Appliance Act in question had no application to tenders, and that, therefore, the trial court erred in its charge on the effect of the statute. The Court further

held that, as the verdict was general, with no special finding upon which the verdict could stand without response to the statute, the case must go back for a new trial. In the case at bar, also, the verdict was general. There was no special finding on which it could stand without response to the requirement in question, and nothing in the record to show that it was not based on the alleged violation of this particular provision.

If a charge to a jury, to the effect that a statute imposed upon a defendant a certain obligation, and that if he violated the same the plaintiff was entitled to recover, does not constitute prejudicial and reversible error, when, in fact, the statute imposed no such obligation, then we are unable to conceive how prejudicial or reversible error could possibly be committed.

CONCLUSION.

Petitioner's complaint is directed primarily to certain language used in the opinion of the Circuit Court of Appeals and the instructions contained in its mandate with reference to the manner in which the complaint might be amended. This language and these instructions, if erroneous, can be corrected in such opinion as this Honorable Court may render. They constitute no ground for the reversal of the judgment of the Circuit Court of Appeals or the reinstatement of the judgment of the District Court. The record is devoid of the meager degree of proof required to establish either that petitioner was engaged in

interstate commerce or that respondent was legally responsible for his injury. More than this, for aught that appears in the record, the judgment rests on the second paragraph of complaint, over which the District Court was clearly without jurisdiction; and, finally, for aught that appears in the record, the jury's verdict was based on the ground that, in using the lever in question, respondent had violated an order of the Interstate Commerce Commission requiring that it should have a maximum drop of fifteen inches, and was the direct result of the erroneous charge of the Court. Because of these manifest and prejudicial errors, the judgment of the District Court cannot stand.

Respectfully submitted,

ALBERT H. COLE,
Counsel for Respondent.

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 2 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN ANSWER TO THE CONTENTION THAT IT HAS WAIVED OBJECTIONS TO THE JURISDICTION OF THE DISTRICT COURT.

ALBERT H. COLE,
Peru, Indiana,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CE ntral 4477.

INDEX.

	Page
Table of cases	i
Table of statutes	ii
Table of textbooks	ii
Introduction	1
Summary of argument	2
Argument	4
Point I	4
Point II	6
Point II (1)	8
Point II (1) (a)	8
Point II (1) (b)	9
Point II (1) (c)	10
Point II (1) (d)	12
Point II (2)	13
Conclusion	18

Table of Cases Cited.

Davidson Marble Co. et al. v. U. S. ex rel. Gibson, 213 U. S. 10 ..... 11, 15, 17

Elliott v. Lawhead, 43 Ohio St. 171, 1 N. E. 577 14

Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98 ..... 13, 17

Mahr v. Union Pacific R. Co., 140 Fed. 921 ..... 14, 17

Massachusetts Bonding etc. Co. v. Concrete Steel Bridge Co., 37 F. (2d) 695 12

McComb et al. v. U. S. Housing Corp., 264 Fed. 589 14

Morris v. Gilmer, 129 U. S. 315..... 8
Southern Pacific Co. v. Arlington Heights Fruit Co., 191 Fed. 101.....11, 16
St. Louis etc. R. Co. v. McBride, 141 U. S. 127..... 17

Table of Statutes Cited.

Federal Employers' Liability Act, 45 U. S. C. A. 51..4, 5, 6
Federal Safety Appliance Act, 45 U. S. C. A. 2..... 5
U. S. C. A., Title 28, Sec. 399, Judicial Code, Sec. 274 c. 11

Table of Textbooks Cited.

Hughes, Federal Practice (1931), Sec. 2081..... 7
Hughes, Federal Practice (1931), Sec. 2223..... 7

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN ANSWER TO THE CONTENTION THAT IT HAS WAIVED OBJECTIONS TO THE JURISDICTION OF THE DISTRICT COURT.

May It Please the Court:

In his reply brief, the petitioner contends that the respondent, by what is claimed to have been a general appearance, has waived the objections which it interposed to the jurisdiction of the trial court. In order that there may be placed before the Court the reasons why respondent insists that there was no such waiver, together with the authorities supporting the same, respondent asks leave to submit the following memorandum.

SUMMARY OF ARGUMENT.

POINT I. **No Question of the Jurisdiction of the District Court, General or Territorial, With Respect to the Cause of Action Declared Upon in the First Paragraph of Complaint, Was Waived by the Filing of the First Paragraph of the Plea in Abatement. On the Contrary, Respondent Adopted the Only Course Which Would Have Saved Its Rights.**

POINT II. **The Objection That the Action Declared Upon in the Second Paragraph of Complaint Could Not Be Maintained Against Respondent in the District Court in Which the Same Was Instituted Was Not Waived by the Filing of the Second Paragraph of the Plea in Abatement, Because:**

(1) **The plea in question did not seek to question the jurisdiction of federal courts generally over the subject matter of the action, but challenged merely the territorial jurisdiction or venue of the District Court for the Northern Division of Indiana, Ft. Wayne Division.**

(a) **It admitted that respondent was a citizen and alleged that it was an inhabitant of Virginia, and denied that petitioner was a resident of the Northern District of Indiana or a citizen of that state, to show that the action could not be maintained in the District Court at Ft. Wayne, even if jurisdiction were founded solely on the ground of diversity of citizenship.**

(b) It did not allege that respondent was a citizen of the same state of which it was a citizen, and only by allegation and proof of such fact could want of jurisdiction of federal courts generally over the subject matter of the action be established, so far as the ground of diversity of citizenship was concerned.

(c) The evidence introduced by respondent in support of this plea (R. 29 to 32) was not for the purpose of establishing the fact that the parties were citizens of the same state, but for the purpose of establishing the fact that petitioner was a resident of Ohio and respondent a resident of Virginia. Its effect was to affirm diversity of citizenship as one of the grounds of the jurisdiction of federal courts generally over the subject matter of the action, but to insist that the particular District Court was without jurisdiction because the action was not brought in the district of the residence of either party.

(d) Not only did the plea and evidence offered in its support affirm, instead of deny, diversity of citizenship as a ground of federal jurisdiction, but it asserted an additional ground of federal jurisdiction over the subject matter of the action, namely, that the suit arose under a law of the United States, and on this very ground maintained that the respondent could be sued only in the district of its residence.

(2) Even had the plea expressly challenged the jurisdiction of federal courts over the subject matter of the action, that fact would have constituted no waiver of objections, presented concurrently therewith, as to the venue or the territorial jurisdiction of the court in which the suit was brought.